No. 91-1944

In The

Supreme Court of the United States

October Term, 1991

NEIL A. USEDEN, AS TRUSTEE OF THE AIR FLORIDA SYSTEM, INC., PROFIT SHARING PLAN AND TRUST,

Petitioner,

vs.

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL; SUN BANK, INC., AND SUN BANK OF MIAMI, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Greenberg, Traurig, Hoffman, Lipoff, Rosen and Quentel ("Greenberg, Traurig"), Sun Bank, Inc., and Sun Bank of Miami, Inc. (collectively "Sun Bank"), respectfully request this Court deny the Petition for Writ of Certiorari which seeks review of the Eleventh Circuit's decision in this case. That decision is reported at 947 F.2d 1563 (11th Cir. 1991) and is reprinted in

Petitioner's Appendix ("PA"). (PA1-47).

STATUTES INVOLVED

In addition to ERISA sections 409 and 502(a) [29 U.S.C. §§ 1109, 1132(a)] the following statute is applicable:

28 U.S.C. § 1367(a):

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

STATEMENT OF THE CASE[1]

Both the circuit and district courts had the benefit of the voluminous record in setting forth the factual background in their decisions. The district court set forth fifty-four undisputed facts. The circuit court, in its *de novo* review of the summary judgment in Respondents' favor, set forth a detailed undisputed fact pattern.

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1. Petitioner's factual contentions, unfettered by the requirement of an accompanying record, are so distorted as to require a brief response.

Petitioner's inaccurate and self-serving factual contentions, therefore, must be ignored.

Nowhere in the lower court opinions is it reflected that Respondent Greenberg, Traurig participated in activities to further an illusion that Air Florida was solvent or that its stock was marketable. The decisions below accurately reflect Greenberg, Traurig's actions as the Air Florida System, Inc., Profit Sharing Plan and Trust's ("the Plan") attorneys in dealing with the acquisition of the shares. Nowhere can there be found any factual basis to support allegations that Greenberg, Traurig conducted a business prudency analysis of the stock purchase, or knowingly participated with the Plan fiduciary in breaches of fiduciary duty. At best for Petitioner, the circuit court merely noted that there was evidence suggesting that an attorney at the firm knew or should have known that a loan redocumentation offended ERISA.

Similarly, the decisions below accurately reflect Respondent Sun Bank's status as lender to the Plan, who at all times dealt with its borrower at arm's-length. There are no facts indicating that Sun Bank knowingly participated in the Plan fiduciary's breach of fiduciary duty.[2]

The district court, though noting that recent case law suggests that ERISA does not provide a cause of action against non-

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2. Sun Bank was never sued as a non-fiduciary who knowingly participated in a breach of fiduciary duty. During the district court's hearing on all pending motions for summary judgment the Petitioner moved *ore tenus* to amend its second amended complaint to include a claim that Sun Bank was a non-fiduciary who knowingly participated in a breach of fiduciary duty. The district court denied Petitioner's motion. (PA66 n. 6). Petitioner argued on appeal that the district court abused its discretion when it denied the motion. (PA47). The circuit court did not consider Petitioner's argument because it rejected the theory of non-fiduciary liability for monetary damages altogether. *Id.* Because Sun Bank was never sued by the Petitioner as a non-fiduciary, Sun Bank is not a proper party to this Court's consideration of the Petition for Writ of Certiorari.

fiduciaries, specifically held that "[i]ndependently, even if there is a cause of action for non-fiduciary liability . . . the record is devoid of evidence indicating that either Sun Bank or Greenberg, Traurig knowingly participated in any breach of fiduciary duty owed by the plan fiduciaries." (PA75, 77).[3]

REASONS FOR DENYING THE WRIT[4]

Congress addressed the question presented and resolved it adversely to Petitioner when it passed the Omnibus Budget Reconciliation Act of 1989 ("OBRA"). The legislative history of ORBA shows that Congress declined to include a proposed amendment which would have added a new subsection to section 409 [§ 1109] explicitly authorizing a cause of action for damages against non-fiduciaries. *See*, H.R. 3299, 101st Cong. 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). Since the passage of ORBA, no circuit court has held that ERISA provides a cause of action for non-fiduciary liability. Indeed, the two circuit courts that have considered the question have expressly rejected the contention that ERISA provides such a cause of action.[5]

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3. Accordingly, even if this Court were to find a private right of action for monetary damages against non-fiduciaries within § 502(a) [§ 1132(a)], this case would nevertheless have to be remanded to the circuit court for *de novo* determination of whether there were any facts set forth in the record precluding the entry of summary judgment in favor of Respondents on the issue of their purported knowing participation in a breach of fiduciary duty.

4. The questions presented are argumentative and accordingly, violate Sup. Ct. R. 14.1(a). Moreover, Petitioner's first question alone is dispositive of the issue presented to the Court – Does ERISA provide a cause of action for damages against a non-fiduciary who knowingly participates in a breach of fiduciary duty by an ERISA fiduciary? The second question presented addresses only the merits of the circuit court's methodology in determining that there is no cause of action for non-fiduciary liability, and consequently is not properly before the Court.

5. *Mertens v. Hewitt Associates*, 948 F.2d 607 (9th Cir. 1991), *cert. pending*, Case No. 91-1671; *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991); *Nieto v. Ecker*, 845

(Cont'd)

There is no real, inherent conflict among the circuits on the question presented. In an attempt to establish a conflict, Petitioner either relies upon cases that were decided before this Court's decision in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985),[6] or that failed to consider the question in light of this Court's conclusion that ERISA's carefully integrated "civil enforcement provisions . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 146.[7]

Moreover, the circuit court's opinion is in accord with this Court's opinions in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990). Contrary to Petitioner's argument, those cases do not require that all trust law remedies be incorporated into ERISA.

(Cont'd)

F.2d 868 (9th Cir. 1988). Further, two other circuits have refused to expand the reach of § 502(a) [§ 1132(a)]. *Flache v. Sun Life Assurance Co. of Canada*, 958 F.2d 730 (6th Cir. 1992) (the Sixth Circuit refused, in light of *Russell*, to find non-fiduciary liability for extracontractual damages); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821 (1st Cir. 1988) (the First Circuit applied the *Russell* analysis and rejected a request to find a remedy under § 502(a)(3) [§ 1132(a)(3)] for extracontractual damages).

6. *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982); *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978).

7. *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989), *Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987); *Fink v. National Savings & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985).

I.

CONGRESS EXPRESSLY CONSIDERED AMENDING ERISA TO CREATE A PRIVATE RIGHT OF ACTION AGAINST NON-FIDUCIARIES AND REFUSED TO DO SO.

Petitioner's reliance upon OBRA is grossly misplaced. Petitioner asserts that because of Congress' enactment of section 502*(l)* [§1132*(l)*] OBRA evidences Congress' assumption that ERISA affords a monetary remedy against non-fiduciaries. An examination of the legislative history, however, reveals that the act clearly expresses congressional intent *not* to subject non-fiduciaries to liability.

The legislative history of OBRA reveals that its drafters proposed a new subsection to section 409 [§1109] of ERISA, which would have *expressly* created a cause of action for non-fiduciary liability. The proposed subsection provided:

> (c) Any person who participates knowingly in, or knowingly undertakes to conceal, an act or omission of a fiduciary with respect to a plan, knowing such act or omission is a breach of fiduciary responsibility to such plan, shall be personally liable to the plan for such breach of fiduciary responsibility in the same manner and to the same extent as if such person were a fiduciary committing such breach.

H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989).[8]

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8. The legislative history further reveals that the proposed subsection was drafted for the express purpose of overruling *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988). OBRA's legislative history states:

(Cont'd)

OBRA, however, was enacted into law without the proposed subsection creating non-fiduciary liability. This deliberate omission demonstrates Congress' intent not to subject non-fiduciaries to the same liability as fiduciaries. As the legislative history shows, Congress had full knowledge of *Nieto's* rejection of the existence of a cause of action for non-fiduciary liability. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Russell*, 473 U.S. at 147. Nevertheless, given the opportunity to reverse the *Nieto* holding, and create such a cause of action, Congress chose not to do so. Accordingly, Respondents submit that the deliberate omission of the proposed subsection from the enacted text of OBRA evidences Congress' clear intent not to change ERISA's existing comprehensive remedial scheme.

The Petitioner's contention that the OBRA amendment, which added section 502*(l)* [§1132*(l)*] to ERISA, somehow evidences Congress' intent to create a private cause of action against non-

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(Cont'd)

> [A] divided panel of the Ninth Circuit in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) held that the absence of specific language in ERISA creating such a cause of action precluded the Court from ordering any remedy against a non-fiduciary, except to the extent that the non-fiduciary engaged in a transaction specifically prohibited by section 406 of ERISA as a party in interest . . . This provision . . . clarifi[ies] congressional intent to codify in ERISA the common law of trusts as it applies to employee benefit plans. The bill's language specifically adopts the familiar trust law doctrine that a knowing participant in a breach of fiduciary duty may be held jointly and severally liable for the loss sustained by a breach of trust in which the knowing participant participates.

H.R. Rep. No. 247, 101st Cong., 1st Sess. 77-78 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 1970. In this case, both the district and circuit courts found *Nieto* persuasive.

fiduciaries is flawed. Section 502*(l)* [§ 1132*(l)*] applies only to the Secretary of Labor.

Subsection (1)(A) of section 502*(l)* [§ 1132*(l)* (1)(A)] applies only to fiduciaries and, accordingly, has no relevance to the questions presented. Subsection (1)(B) of section 502*(l)* [§ 1132*(l)* (1)(B)] permits the Secretary to impose a civil penalty, not damages, against non-fiduciaries who knowingly participate in a fiduciary breach.[9] There is absolutely no basis to suggest that section 502*(l)* [§ 1132*(l)*] creates a cause of action against non-fiduciaries by private parties. The section did not expand the reach of ERISA, it merely enlarged the power of the Secretary of Labor.[10]

Indeed, the six carefully integrated civil enforcement provisions of section 502(a) [§ 1132(a)], provide strong evidence that Congress did not intend to authorize remedies that it did not expressly incorporate into the statute.

Further, in *Russell*, this Court applied the four-prong *Cort v. Ash*, 422 U.S. 66 (1975), analysis to section 502(a) [§ 1132(a)] and determined that no private right of action for extracontractual damage exists under ERISA. In *Russell*, this Court found that there was no legislative intent to create a private right of action and such a right of action would be inconsistent with ERISA's comprehensive legislative scheme. Here too, the same legislative intent and

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9. *See* § 502(i) [§ 1132(i)]. *See also*, H.R. Rep. No. 247, 101st Cong., 1st Sess. 55 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 1947 wherein the Committee expressed their intention to encourage compliance with health insurance continuation rules by authorizing the Secretary to sue under the new civil penalty section. The legislative history evinces that the "other persons" contemplated by the statute were employers, plan administrators, insurance companies, or health maintenance organizations.

10. It should be noted that the Secretary's enlarged authority under § 502 [§ 1132] applies only to fiduciary breaches occurring after the date of enactment — December 19, 1989.

scheme militate against creating a private right of action for damages against non-fiduciaries. There is nothing in the language of the statute to support Petitioner's position.[11]

II.

ALL OF THE CIRCUIT COURT CASES CITED BY PETITIONER TO SHOW A CONFLICT WERE EITHER DECIDED BEFORE, OR FAILED TO CONSIDER THE IMPACT OF THIS COURT'S RECENT ERISA DECISIONS.

When examined, the circuit court cases cited by the Petitioner

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11. Petitioner's argument that the circuit court's analysis was a departure from this Court's guidelines for statutory interpretation as set forth in cases such as *Cort v. Ash*, because it purportedly failed to consider whether Congress intended to create a private damage action against non-fiduciaries is completely without merit. Petitioner's selective distillation of the circuit court's analysis ignores the fact that the circuit court's painstaking dissection of ERISA's text was a direct exercise in ascertaining congressional intent. (PA44-45). As this Court has recognized, "Congress' intent may appear implicitly in the language or structure of the statute ..." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979)); *See also Suter v. Artist M.*, 112 S.Ct. 1360, 1369 n.11 (1992) ("we have found an intent by Congress to foreclose remedies under § 1983 where the statute itself provides a comprehensive remedial scheme which leaves no room for additional private remedies...").

In examining ERISA's text, the circuit court found that Congress had contemplated the involvement of non-fiduciary parties when it drafted §§ 502(a)(3) [§ 1132(a)(3)] and 502(a)(5) [§ 1132 (a)(5)]. These sections "authorize suits to enjoin or obtain other equitable relief for 'any act or practice' violating either the statute or the terms of a plan, without restricting the types of parties who may be so sued... Significantly, however, Congress expressly limited the scope of...section 409(a) [§ 1109(a)] to provide a right of action only against fiduciaries." (PA44). Accordingly, the circuit court concluded that Congress' intent was to limit the scope of § 409(a) [§ 1109(a)] solely to fiduciaries. As this Court stated in *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981), "unless this congressional intent can be inferred from the language of the statute, the statutory structure or some other source, the essential predicate for implication of a private remedy simply does not exist."

fail to establish conflict. The cited cases fall into two categories. The first category of cases were decided before *Russell*, and therefore should not be considered in determining whether a conflict exists among the circuits.[12]

The second category of cases decided after *Russell* do not cite *Russell*, ignore this Court's careful analysis in *Russell*, and are factually distinguishable from this case. In *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) the Secretary of Labor instituted an action for *equitable relief* against union officials who personally profited from fiduciary breaches. The Sixth Circuit held that a non-trustee "may be found liable . . . for aiding and assisting [a trustee] and furthering his breach of fiduciary duty" and directed the union officials to disgorge their profits. In *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987), the court held that a non-fiduciary "party in interest" may be held liable under ERISA for prohibited transactions. In *Fink v. National Savings & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985), which involved fiduciary and co-fiduciary liability, the court, in *obiter dicta*, stated that "a district court may award relief against non-fiduciaries who knowingly participate in a breach of trust." *Whitfield v. Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989), was a suit by the Secretary of Labor against a plan trustee and the trustee's attorney. In *Whitfield*, the Fifth Circuit concluded, without analysis, that the attorney was "jointly liable . . . as a non-fiduciary who knowingly participated in a breach of trust."[13]

In addition, Petitioner attempts to manufacture conflict by

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12. *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982); *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978).

13. Each of these post *Russell* cases was decided before Congress declined to create a cause of action for damages for nonfiduciary liability in 1989 when it enacted the OBRA amendments to ERISA. *See* Section I, *supra*.

incorrectly asserting that *Useden* conflicts with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Petitioner erroneously argues that *Firestone* stands for the proposition that the entire body of the common law of trusts is to be engrafted onto ERISA "lock, stock and barrel."

Firestone involved an action for benefits under subsection 502(a)(1)(B) [§ 1132(a)(1)(B)]. Contrary to Petitioner's assertions, in *Firestone* this Court addressed only the limited procedural issue of the appropriate standard of review of benefit determination decisions by plan fiduciaries under ERISA. *Id.* at 105. In resolving the question, this Court simply indicated that it was "guided by principles of trust law." *Id.* at 111. It is inconceivable how Petitioner can interpret this language to form the basis for an argument that all common law trust remedies are incorporated into ERISA.

The circuit court, in *Useden*, properly read *Firestone* in conjunction with this Court's opinion in *Russell* and concluded:

> Accordingly, we interpret ERISA to embody a tailored law of trusts - a legal fabric which not only adopts familiar trust principles, but also supplements these principles with more exacting standards, *and* exempts from its reach certain parties and activities that may have been amenable to suit under traditional trust law. See *Eaves v. Penn*, 587 F.2d 453, 457 (10th Cir. 1978). Thus, while it is obvious that ERISA is informed by trust law, the statute is, in its contours, meaningfully distinct from the body of the common law of trusts. A method of interpretation consonant with this realization will reject the unselective incorporation of trust law rules into ERISA. Rather, a court should only incorporate a given trust law

> principle if the statute's text negates an inference that the principle was omitted deliberately from the statute. ERISA is a "comprehensive and reticulated statute."

(PA42-43) (citation omitted). Accordingly, *Firestone* assists the courts in effectuating the remedial scheme contemplated by Congress when it enacted ERISA. It does not authorize the creation of new causes of action not specifically contemplated by Congress.

Petitioner's argument that the circuit court's reliance upon *Russell* is misplaced because *Russell* "has been thoroughly undercut" by *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990), is simply mysterious.

In *Russell*, this Court held that ERISA did not authorize a private right of action for extracontractual damages. Noting that section 502 [§ 1132] identifies six types of civil actions that may be brought by various parties,[14] Justice Stevens, writing for the Court, found that the integrated provisions of section 502 [§ 1132] provided strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to expressly incorporate. The opinion, quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-74 (1979), cautioned that "[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Russell*, 473 U.S. at 147. Additionally, in *Russell*, this Court stressed that "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Id.* at 145 (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)).

Ingersoll is an ERISA preemption case and does not support Petitioner's argument that the courts can create ERISA causes of

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14. *Russell*, at 139-40.

action which are contrary to expressed congressional intent. In *Ingersoll*, this Court considered whether ERISA preempted an employee's state common law wrongful discharge claim. *Ingersoll*, 111 S.Ct. at 481. The employee specifically indicated that he was "*not* seeking lost *pension benefits* but [was] instead seeking future lost wages, mental anguish and punitive damages as a result of the wrongful discharge." *Id.* (emphasis in original) (citations omitted).

Notwithstanding the employee's argument, this Court found that the state law claim was preempted and that the claim, which was "prototypical of the kind Congress intended to cover under § 510," conflicted directly with an enumerated ERISA cause of action enforceable under section 502(a) [§ 1132(a)]. *Id.* at 485.

In *Ingersoll*, this Court quoted directly from *Russell* stating:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA - plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'

Ingersoll, 111 S. Ct. 485 (quoting *Russell*, 473 U.S. at 146).

In addition, this Court compared section 502(a) [§ 1132(a)] of ERISA to section 301 of the Labor Management Relations Act and stated:

> 'Congress was well aware that the powerful pre-emptive force of § 301 of the LMRA displaced' all state-law claims, 'even when the state action purported to authorize a remedy unavailable under the federal provision.'

111 S.Ct. at 486(quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55 (1987)).

In *Ingersoll*, this Court indicated that it relied on these quoted provisions to determine that the employee's state law cause of action was preempted by ERISA and directly conflicted with "a right expressly guaranteed by § 510 and exclusively enforced by § 502(a)." 111 S.Ct. at 486.

Petitioner seeks to utilize one sentence in the last paragraph of *Ingersoll* to support his conclusion that all remedies available under state law should likewise be available under ERISA.[15] Petitioner's conclusion, however, cannot be reconciled with this Court's long-standing interpretation of section 502(a) [§1132(a)] which is set forth with utmost clarity in *Ingersoll*. The logical interpretation of the last paragraph of *Ingersoll* consistent with this Court's discussion in *Ingersoll* and its holdings in *Russell*, *Pilot Life* and their progeny, is that the employee's cause of action arose under section 510 [§ 1140], and was remediable under section 502(a) [§ 1132(a)].

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15. *Id.* at 486.

III.

THE CIRCUIT COURT'S FINDING THAT ERISA DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION FOR DAMAGES AGAINST NON-FIDUCIARIES DOES NOT DEPRIVE TRUST BENEFICIARIES OF A REMEDY THEY POSSESSED BEFORE ERISA'S ENACTMENT AND DOES NOT CREATE A GAP IN ERISA'S REMEDIAL SCHEME.

Petitioner's argument that failure to create a private cause of action against a non-fiduciary for damages deprives trust beneficiaries of a remedy they possessed before ERISA's enactment, and creates a gap in ERISA's remedial scheme, is totally unfounded.

ERISA's remedial scheme provides specific entities with carefully defined remedies.[16] That a non-fiduciary cannot be sued under ERISA for damages does not mean that a gap exists preventing a plan or participant from being made whole. If a non-fiduciary is not liable for damages under ERISA, then state common law actions like negligence, professional malpractice[17] or statutory causes of action such as those arising under the uniform

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16. For example, § 502(a)(3) [§ 1132(a)(3)] can be interpreted to provide a basis for injunctive and/or equitable relief against a non-fiduciary by a participant, beneficiary or fiduciary. Subsection 502(a)(5) [§ 1132(a)(5)] provides the Secretary of Labor with such authority. Subsection 502(a)(6) [§ 1132(a)(6)] authorizes the Secretary of Labor to impose civil penalties against non-fiduciaries.

17. *See In re Masters, Mates & Pilots Pension Plan and IRAP Litigation*, 957 F.2d 1020 (2d Cir. 1992) (Negligent performance as investment advisor can be remedied under state law.); *Painters of Philadelphia District Council v. Price Waterhouse*, 879 F.2d 1146 (3d Cir. 1989) (ERISA does not preempt state professional malpractice actions.).

commercial code, are not preempted by section 514 [§ 1144].[18]

Petitioner, contrary to his comment in footnote 9 in his brief, cannot seriously argue that ERISA preempts a professional malpractice claim. Were this the case, then a simple act of negligence such as failing to timely file a complaint, or failing to prosecute would go unremedied because the ERISA plan or fiduciary could not sue the attorney under a state law claim, and t he conduct would not amount to a knowing participation in a breach of trust. Petitioner's state common law and statutory causes of action against Respondents were not preempted. There is simply no gap in ERISA's remedial scheme which would warrant this Court's granting the Petition for Writ of Certiorari.

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18. Further, even if there is no claim against the non-fiduciary for a permitted civil enforcement remedy, pursuant to 28 U.S.C. § 1367, the district court would have supplemental jurisdiction to hear that claim if other parties subject to ERISA are before the court. Indeed, the Plaintiff in *Mertens*, unlike the Petitioner here, pled his cause in the alternative and his complaint contained a count for professional negligence.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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